IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1506

VINCENT C. ZAZZARA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TOPICAL INDEX

TABLE OF AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Vincent C. Zazzara, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered March 3, 1978, and the Order Denying the Petition for Rehearing entered on March 31, 1978.

OPINION BELOW

The Court of Appeals entered its opinion on March 3, 1978. Thereafter, a Petition for Rehearing was ordered denied. Said Order was entered on March 31, 1978.

A copy of the opinion, affirming the judgment of conviction is attached as Appendix A and a copy of the Order Denying the Petition for Rehearing is attached as Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court below impermissably amend the Grand Jury Indictment, thereby depriving it of further jurisdiction over Petitioner?

2. Was the Petitioner placed on trial twice for the same offense, thereby violating his right not to be subject to being placed in jeopardy for the same offense a second time?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 5 to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a Grand Jury, . . .; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived, liberty or property, without due process of law;. . ."

STATEMENT OF THE CASE

The Petitioner was charged on two separate occasions with various violations of 18 U.S.C. 1014 (false statements in loan applications to a federally insured bank). On May 10 of 1976, the first three-count indictment was filed with the court below charging the Petitioner with making a false statement to three separate federally insured banks. Count One alleged a violation occurring on August 15, 1973, to Crocker National Bank. Count Two alleged a violation occurring on August 29, 1973.

Count Three alleged a violation occurring on May 29, 1974. On May 13, 1976, a jury was duly impaneled and sworn with trial commencing on July 15, 1976. Thereafter, the indictment was dismissed upon the motion of the Government in the interest of justice. This was no. CR 74-677.

On February 28, 1977, No. 77-260, a four count indictment was returned against Petitioner in the court below. This was thereafter superceded by virtually an identical indictment numbered CR 77-260(A)-(DW)(hereinafter referred to as the "last indictment".).

Count One of both the original and the last indictment charged essentially the same offense. Count Three of the last indictment alleged an offense against the same bank set forth in Count Two of the original indictment, but at a somewhat later date. Count Four of the last indictment alleged the same offenses set forth in Count Three of the original indictment. The only purported new matter set forth in the last indictment was contained in Count Two which alleged a violation occurring on or about November 26, 1973, involving a Bank

of America.

Separate Motions to Dismiss on the grounds of prejudicial pre-trial delay and prior jeopardy were filed by Petitioner. In his affidavit in support of his Motion to Dismiss because of the pre-trial delay, the Petitioner alleged prejudice because of:

1) The passage of time in and of itself (a period of almost 4 years as set forth in the last indictment until the time of trial in March and April of 1977); and

2) The death of John H. Kirk, his personal and business attorney during the times in question whom Petitioner alleged would have been a most important witness with respect to the transactions as set forth in the last indictment.

The court held an evidentiary hearing on both issues at which the Grand Jury testimony of Mr. Kirk was introduced into evidence, and Petitioner himself testified as to the necessity of having Mr. Kirk and various documents he believed to be in his possession at his trial. At the conclusion thereof, the court denied

the Motion to Dismiss on the grounds of prejudicial delay on the grounds that the delay had not worked "legally to the prejudice of this defendant, adding, parenthetically, however:

> "I don't think that any of the acts of the government in this case merit any commendations; they should have been a whole lot speedier about bringing this case to a state of readiness."

Petitioner's written Motion to Dismiss the last indictment on the grounds of prior jeopardy were aimed at Counts One, Three and Four. No formal objection was filed with respect to Count Two as that count apparently, on its face, alleged a new and different matter than that set forth in the previous three counts of the original indictment.

During the course of argument on the double jeopardy issue, counsel for the government conceded that it knew, or should have been charged with knowledge, of all of the facts forming the basis of the allegations set forth in the last indictment. At the conclusion of these arguments,

the court dismissed Counts One and Four but would not dismiss Count Two because it appeared to be a new and separate transaction and ruled that Count Three set forth a different date and what seemed to be a different false representation than that alleged in the original indictment. While the Petitioner's Motion to Dismiss did not contain any specific reference to Count Two, it was in fact discussed during the course of argument and the court in its final ruling stated as follows:

> "I decline to dismiss Counts 2 or 3 because 2 appears to be for the new transaction and 3 appears to be a totally new representation made in connection with the sought-after extension of the loan."

Trial commenced on April 4, 1977. Shortly thereafter, government counsel moved to dismiss Count Three and further moved to amend the last indictment by striking the words "dated April 30, 1973" in Count Two of the indictment as surplusage. Counsel for Petitioner objected strenuously on the grounds that it was not a mere

correction of a clerical error but was in fact a change of substance inasmuch as there were two written financial statements, one dated April 30, 1973, and one dated December 30, 1972, furnished to counsel by the government in response to the court's discovery order. The motion was granted, after considerable argument and over the strenuous objection of petitioner's counsel on the grounds that the amendment in fact was more than a "mere correcting" of a clerical error, and in fact permitted the substitution of a new evidentiary document in place of the one set forth in the indictment, without a showing that the December 30, 1972, statement had ever been presented or considered by the Grand Jury.

During the course of the trial, the government introduced, over objection, evidence of the same two transactions which were contained in the original indictment and which were dismissed on prior jeopardy grounds.

REASONS WHY THE COURT SHOULD GRANT THE WRIT:

THE RULE AGAINST "NO AMENDMENT" OF A GRAND JURY INDICTMENT STATED IN EX PARTE BAIN* HAS BEEN SO ERODED BY EXCEPTIONS AND DISTINCTIONS IN THE COURTS BELOW THAT IT NO LONGER EXISTS. IT IS INCUMBENT UPON THIS COURT IN THE EXERCISE OF ITS SUPERVISORY POWERS TO RESTATE AND CLARIFY THE RULE AS TO WHAT AMENDMENTS ARE CONSTITUTIONALLY PERMISSIBLE FOR THE PROPER GUIDANCE OF THE COURTS BELOW. FURTHERMORE, THE HOLDING OF THE COURT BELOW IN THE CASE AT BAR IS IN DIRECT CONFLICT WITH ITS HOLDING IN HOWARD V. DAGGETT, INFRA.

ARGUMENT

The Petitioner was charged in the last indictment with submitting a false financial statement bearing the date of April 30, 1973. Copies of two separate written financial statements had been supplied to counsel for Petitioner, one dated April 30, 1973, and one dated

*121 U.S. 1, 13, 7 S.Ct. 781 (1832)

December 30, 1972. During the course of argument on the motion to strike the date as to the April 30 statement*, counsel for Petitioner stated to the court that he had not examined or considered the December 30, 1972 statement prior to the time of trial. The court of appeals in its judgment affirming Petitioner's conviction (Appendix A) held that the words in question were "mere surplusage" and could be stricken without violating the Petitioner's constitutional rights guaranteed under Amendment 5 to the United States Constitution to be brought to trial on a "presentment or indictment of the Grand Jury." The label "surplusage" or "mere clerical error" becomes, of course, the kiss of death to the Petitioner's claim that the amendment of the court below was impermissible under the Fifth Amendment.

In the case at bar, there were two separate and distinct written financial statements. There is no way for this court, or for any court, to know which of these

*While the court did not strike the date from the indictment in a formal sense, it was omitted when the charge in County 2 was read to the jury, just as in Howard v. Daggett, infra.

documents was in fact presented to the Grand Jury and whether in fact the Grand Jury either saw or considered the 1972 statement. Assume hypothetically Petitioner had been charged with uttering a forged check dated April 30, 1973, and at the time of the trial, the date of the check was changed to December 30, 1972. This could hardly be characterized as a mere striking of "surplusage". This begs the question. In truth and in fact, under the circumstances of the case at bar, and in the hypothesis given, the changing of the date and the substitution of one document for another creates a totally separate and different crime and one which certainly is not the indictment of the Grand Jury.

The court of appeals went on to hold that even though the change may have been impermissible, there was sufficient evidence under paragraph A of Count Two, standing alone, to convict the Petitioner. While this may or may not be true, it is respectfully submitted that this invades the province of the jury. There is no way of telling from the jury's verdict what the jury's findings were with respect to

either paragraphs A or B, which contained the stricken date. It may well be the jury found there was insufficient evidence to convict under paragraph A, but convicted on the document substituted in paragraph B. This court, in Ex Parte Bain, Supra, stated what has generally been considered to be a "no amendment rule". The court therein, at page 13, stated as follows:

> "We have no difficulty in holding that the indictment on which he was tried was no indictment of a grand jury. The decisions which we already referred to, as well as sound principle, require us to hold that after the indictment was changed, it was no longer the indictment of the grand jury which presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provisions at the mercy or control of the court or prosecuting

> attorney; for, if it becomes once held that changes can be made by the consent or order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer the indictment as thus changed, the restriction which the constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists." (emphasis added)

The rule laid down in Ex Parte Bain, supra, was cited with approval in U.S. v. Norris, 281 U.S. 619; U.S. v. Stirone, 361 U.S. 212, 80 S.Ct. 270; and Russell v. U.S., 369 U.S. 749, 82 S.Ct. 1038 (1962). In the Stirone Case, Supra, the court said as follows at page 217:

> "The Bain case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment

against him. (citing cases) Yet the court did permit that in this case." Cf. Clyatt v. U.S., 197 U.S. 207.

In the Stirone case, Supra, this court reversed the guilty verdict of the court below holding that the introduction into evidence of certain matters not alleged in the indictment was "neither trivial, useless nor inoculous." (page 217)

Again, in Russell v. U.S., Supra, this court cited the same provisions from Ex Parte Bain, Supra, as are set forth above, quoting with approval from U.S. v. Stirone, Supra.

U.S. v. Williams, 412 F.2d 625 (1969) 3rd Cir. was a case in which the defendant consented to amendment of the indictment and thereafter plead guilty. The court held "an amendment of substance to the body of an indictment violates the Fifth Amendment even if the accused agrees that the facts stipulated should have the same effect as if set out in the indictment itself."(page 627)

Connor v. Picard, 434 F.2d 673 (1970) 3rd Cir. involved a habeas corpus proceeding against a state court wherein the defendant's

name was substituted in the indictment was the person whom the grand jury had charged as a "John Doe". The court of appeals, again citing Ex Parte Bain, Supra, held that the state's practice of substituting the defendant's name in place of a John Doe name by the Grand Jury violated the defendant's Fifth Amendment rights inasmuch as there was no showing was to what evidence, if any, had been considered by the Grand Jury as against the particular defendant ultimately charged.

Howard v. Daggett, 526 F.2d 1388, (1975) 9th Cir. is almost on all fours with the case at bar. Defendant was charged with violating the Mann Act. Count Three of the indictment specifically charged defendant with traveling in interstate commerce to promote prostitution with two specifically named women. The court's instructions to the jury as to the essential elements they had to find in order to convict the defendant failed to include the names of the two women that were named in the indictment. In response to the jury's request for further instructions as to which was controlling, the indictment or the instructions, the court instructed the jury

as follows:

> "If you find language or wording in the indictment that is not contained in the statement of essential elements contained in instruction number 28, you may consider the additional language in the indictment mere surplusage and the same may be disregarded by you." (emphasis added)

In the case at bar, a specifically named document was withheld from the jury as "mere surplusage", just as in Howard, Supra. The court specifically held, citing from Stirone, Supra, at page 1390:

> "The supplemental instruction constituted an impermissible amendment to the indictment that 'destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury'". See also, U.S. v. Smolar, 557 F.2d 13 (1970) 1st Cir.

It is difficult, if not impossible, to see any distinction between a specifically described person and a specifically described document.

Decisions approving the trial courts' striking "surplusage", or correcting "clerical erros" are numerous. What is "form" and what is "substance"? The labels alone are meaningless and give no guide as to the issues involved.

Petitioner contends that the substitution in evidence of a different document than that alleged in the Grand Jury indictment is more than the withdrawal of "surplusage", and in truth and in fact, is the allegation of a new and different crime, and therefore, not the charge or presentment of the Grand Jury.

It is respectfully submitted that the constitutional right invoked by the Petitioner and the erosion of that right through the various exceptions and modifications engrafted on the rule by the circuit courts below, warrants the examination of the question by this court in order that Petitioner's constitutional right may be given proper protection.

ADDITIONAL REASONS WHY THE COURT SHOULD GRANT THE WRIT:

AN ALLEGED "WAIVER" BY A CRIMINAL DEFENDANT OF AN IMPORTANT AND FUNDAMENTAL CONSTITUTIONAL RIGHT SHOULD NOT BE LIKELY INVOKED BY AN APPELLATE COURT IN PASSING ON SUCH A CLAIM.

FURTHERMORE, THE RULING OF THE NINTH CIRCUIT COURT OF APPEALS IS IN DIRECT CONFLICT WITH THE RULING OF THE 7TH CIRCUIT COURT OF APPEALS IN U.S. V. ANDERSON, INFRA.

ARGUMENT

The court below, in its judgment, refused to consider the defendant's claim of "double jeopardy" on the grounds that the defendant had waived the defense, expressly holding:

> "We will not now consider the question on appeal," citing Haddad v. United States, 349 F.2d 511, 514 (cert. den.) 382 U.S. 896 (Appendix A).

It is true that the Petitioner did not formally raise the prior jeopardy objection before the trial court in his written motion because, on its face, the last indictment seemed to prevent at least one new fact

situation not alleged in the original indictment. For the first time, during the course of the motion to suppress the other three counts, counsel for Petitioner learned from the U.S. Attorney that the government "knew or should have known of the facts which formed the basis of Count Two of the indictment." Furthermore, as appears in the statement of facts, the court, in passing on the Petitioner's motion to dismiss because of prior jeopardy, expressly held that Count Two presented new and different facts from that contained in the original indictment. It is clear, therefore, that while Petitioner's objection was not contained in his written motion, it was raised during the course of the argument on the motion, and the court expressly ruled thereon.

At Petitioner's trial, the government introduced evidence as to all three counts of the indictment that had been dismissed, including two that the court had dismissed on the grounds of prior jeopardy urged by Petitioner. The evidence as to these counts came in under the Doctrine of "Prior

Similar Acts."

This court, in Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033 (1963), held that jeopardy attaches the moment that the jury is impaneled and sworn even though no witnesses were called against the defendant.

In U.S. v. Anderson, 514 F.2d 583 (1975) 7th Cir., this issue was precisely involved. Here the defendant had plead guilty to a lesser included offense which was thereafter vacated pursuant to a 2255 petition, the defendant permitted to withdraw his guilty plea, and was thereafter tried on the greater offense. No formal double jeopardy claim was presented at trial. The government argued that the Petitioner had "waived" his claim thereon, precisely the issue presented here.

The court, at page 586, stated as follows:

> "A finding of waiver requires an 'intentional relinquishment or abandonment of a known right or privilege'. Johnson v. Zerbst, 304 U.S. 458. We should particularly scrutinize the claim of

> waiver when it relates to a right as fundamental as that embodied in a constitutional protection against double jeopardy." (Ketner v. U.S., 195 U.S. 100.)
> "In this case we do not find 'intentional relinquishment' of a 'known right'. A double jeopardy defense is normally not the type of claim that would be foregone for some strategic reason. Indeed, the question of a possible double jeopardy problem was at least mentioned before the district court." (emphasis added)

The court went on to hold that the lesser included offense to which the defendant had plead guilty was included in the offense charged at the subsequent trial and that the plea of guilty to the prior offense barred prosecution on the greater.

Although this point was neither raised on Petitioner's appeal nor argued, a further violation of the Petitioner's constitutionally protected right not to be placed twice in jeopardy on the same charge resulted from the government's use of the

two transactions contained in Count One and Count Four of the last indictment which was identical to Count One and Count Three of the original indictment.

This precise issue was raised in a writ of habeas corpus proceeding in Wingate v. Wainwright, 464 F.2d 209 (1972) 5th Cir., where the Petitioner had been tried in a state court on a robbery charge. During the course of the trial, the prosecutor introduced evidence of two prior robberies on which the Petitioner had been tried and acquitted. References were made to these prior crimes as proof of intent in both his opening and closing statements, as in the case at bar. The court made an exhaustive analysis of the "collateral estoppel" rul in civil cases as applied to criminal cases, where the Petitioner had been acquitted of the "prior similar acts" and concluded they were no more admissible at a second trial on another charge to prove a "merely evidentiary fact" than they would be to prove an "ultimate fact."

Concededly, in the case at bar, there was no finding of guilt or innocence

by the trier of fact at the first trial. Nonetheless, the government was at liberty to prosecute Petitioner on these two counts and should not be permitted to re-prosecute under the guise of introducing these transactions as evidentiary matter.

In Morgan v. Devine, 37 U.S. 632 (1915), this court expressly held that a defendant in a criminal case has been placed in jeopardy if he could have been convicted of an offense charged in the second proceeding. The Wingate court in this regard refers to a decision of this court in Ashe v. Swenson, 397 U.S. 436, which holds that the collateral estoppel rule prohibits a relitigation in any future lawsuit between the same parties where the same acts were determined at a previous trial. (page 443)

At page 213, the court goes on to hold:

> "We do not perceive any meaningful difference in the quality of 'jeopardy' to which a defendant is again subjected when the state attempts to prove his guilt by relitigating a settled fact issue

which depends upon whether the relitigated issue is one of 'ultimate fact' or merely 'an evidentiary fact' in the second prosecution. In both instances, the state is attempting to prove a defendant guilty of an offense other than the one of which he was acquitted. In both instances, the relitigated proof is offered to prove some element of the second offense. In both instances, the defendant is forced to defend against against charges or factual allegations which he overcame in the earlier trial."

As conceded above, Petitioner was not acquitted at the previous trial inasmuch as the government chose not to present any evidence against him. However, at the second trial, the evidence of the "prior similar acts" was a very substantial factor in the government's evidentiary case against Petitioner. To permit the government to do indirectly what it could not do directly would make a mockery of the constitutional right not to be put in

jeopardy twice for the same offense.

CONCLUSION

It is respectfully submitted that because of the serious constitutional issues presented, and because of the conflict in the decisions below, both within and between the Circuits as set forth above, that the Writ of Certiorari should issue.

Respectfully submitted,

Carl E. Stewart

CARL E. STEWART, ESQ.
Attorney for Petitioner

EXHIBIT A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAR 3 1978
Emil E. Melfi, Jr.
Clerk, U.S. Court
Of Appeals

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
VINCENT C. ZAZZARA, aka
C. Vincent, and Zaz Vincenzo,
Defendant-Appellant.

M E M O R A N D U M No. 77-2140

Appeal from the United States District Court for the Central District of California

BEFORE: BROWNING, GOODWIN and KENNEDY, Circuit Judges.

Finding no merit in any of the four grounds for this appeal, we affirm the conviction of Vincent C. Zazzara for making statements to a federally insured bank in connection with a loan application, in violation of 18 U.S.C. § 1014.

Appellant claims he was denied due process of law because of pre-indictment delay. To prevail, appellant must show that actual prejudice resulted from the delay, United States v. Lovasco, 431 U.S.

783, 97 S.Ct. 2044 (1977); United States v. Mays, 549 F.2d 670, 677 (9th Cir. 1977). And even if actual prejudice is demonstrated, the court must consider the reasons for the delay before concluding that there was a due process violation. Appellant did show that his accountant died during the period of the alleged delay, but he has not shown that the accountant's testimony would have been of any assistance to the defense case. Indeed, all indications in the record are that the accountant had no information that would be helpful to the defense. Cf. United States v. Wilson, 492 F.2d 1345 (3d Cir. 1973), rev'd on other grounds, 420 U.S. 332 (1975)(defendant prejudiced by delay because witness who was vital to his defense became unavailable.) Consequently, appellant has failed to show that he was prejudiced by the alleged delay. Moreover, there is no showing that the government delayed prosecution for any impermissible reason. There has been no due process violation here.

Appellant's second contention is that his conviction violates the constitutional guarantee against double jeopardy because

he was tried on a charge which had been the subject of an earlier indictment that had been dismissed on his motion. The appellant failed to raise the defense of double jeopardy in the court below, and the defense was therefore waived; we will not now consider the question on appeal. Fed. R. Crim. P. 12; Haddad v. United States 349,F.2d 511, 514 (9th Cir.), cert. denied, 382 U.S. 896 (1965).

Third, appellant argues that by striking from the indictment the date of an allegedly false financial statement the trial court made an impermissible amendment of the indictment. In Ex parte Bain, 121 U.S. 1 (1887), the Supreme Court held that an amendment to an indictment violates an accused's fifth amendment right to be tried only after presentment or indictment by a grand jury, and renders a conviction based thereon void. Over time, numerous exceptions and limitations have been grafted onto this rule. It is clear that changes which are merely a matter of form, which simply correct typographical errors, or which delete surplusage are permissible. See United States

v. Dawson, 516 F.2d 796, 801-02 (9th Cir.), cert. denied, 423 U.S. 855 (1975); United States v. Edwards, 465 F.2d 943, 950 (9th Cir. 1972).

In this case the accused was charged in paragraph (a) of count 2 with making misrepresentations to the Bank of America by submitting an individual financial statement dated April 30, 1973. Paragraph (b) of count 2 charged appellant with misrepresentations by submitting a company financial statement "dated April 30, 1973." In fact the company statement was dated in December, 1972, and the court amended the indictment by striking the reference to a date in paragraph (b). We believe the indictment described the two statements with sufficient particularity and that the erroneous date of the company statement recited in the original indictment was surplusage which could be stricken without violating any of appellant's constitutional rights. See United States v. Edwards, supra (deletion of erroneous location considered surplusage); United States v. Buble, 440 F.2d 405 (9th Cir.), cert. denied, 404 U.S. 828

(1971)(change in year of tax returns deemed constitutional). And in any event there was sufficient evidence to convict the defendant under paragraph (a) of the indictment standing alone.

Fourth, appellant argues that the evidence was insufficient to sustain the conviction. Viewing the evidence in the light most favorable to the government as the prevailing party, Glasser v. United States, 315 U.S. 60, 80 (1942), we find the evidence clearly sufficient to sustain the instant conviction.

Affirmed.

EXHIBIT B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

F I L E D

MAR 31 1973

EMIL E. MELFI, JR.
Clerk, U.S. Court of Appeals

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. VINCENT C. ZAZZARA, aka C. Vincent, and Zaz Vincenzo, Defendant-Appellant.	)	No. 77-2140 ORDER

Appeal from the United States District Court for the Central District of California

BEFORE: BROWNING, GOODWIN and KENNEDY, Circuit Judges.

The petition for rehearing is DENIED.

EXHIBIT B